IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1631 OF 2004

M/s.A.B.I. Express Pvt. Ltd. .. Petitioner

Versus

State of Maharashtra & Ors. .. Respondents

Mr.A.J.Panicker for petitioner

Mr.K.K.Jadhav for respondent No.2

Mr.S.S.Tatkare, A.P.P. for State.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 1st December 2005.

P.C.

. Rule. Respondents waive service. Heard learned Counsel appearing for parties.

. At the request of Mr.Panicker, appearing for petitioner, name of respondent No.3 is

deleted.

2. Rule. Mr.Jadhav appearing for respondent No.2 waives service. A.P.P. appears for State. By consent heard forthwith.

3. Order of learned Sessions Judge dated 17th April 2004 is under challenge in this petition under Article 227 of the Constitution of India read with section 482 of Cr.P.C. at the instance of original complainant.

4. Petitioner is the original complainant. Petitioner had instituted a criminal complaint in the 22nd Court Esplanade Mumbai against respondents herein as also one Sudesh More (Accused No.1) who was their employee for offences punishable under sections 403, 406, 408, 418, 420, 468, 471 and 477 read with 34 I.P.C.

5. In the complaint the allegation was that

the accused No.1 is their branch manager in the branch at Adarsh Nagar, Andheri (East). The company is engaged in the business of courier service both domestic and international. At the relevant time accused No.1 was branch manager. Respondent No.2 before me (original accused No.3) is a partner of one Motwani International, a firm which was utilising services of complainant company through the said branch. For such services rendered the accused No.3 was required to pay to the complainant company service charges. It is alleged that although the said firm of which accused No.3 is partner, availed of courier service, did not pay outstanding sum of Rs.7,84,887/-.

6. Allegation is that in the month of January 2000, head office of petitioner received a cheque for Rs.4 lakhs drawn on Bank of Maharashtra, Kandivali branch, Mumbai. Said cheque was issued, according to complainant by

the firm towards partial discharge of the aforesaid liability. On presentation, the said cheque was not honoured. First two reasons for not honouring the cheque, according to Banker were "drawer’s signature differ". However, upon the matter being taken up with the employee as well as the firm a fax was addressed on 13th January 2000 on the letterhead of the accused No.3/firm which reads thus:-

> " This is to inform you that inspite of instructing you not to deposit the cheque till our further instructions you went forward to deposit the cheque on 11/01/2000 without even informing us, since we expected some funds by 15/01/2000 but due to your carelessness you have put us in a tremendous problem with our bankers and on your commitment that you will inform us before depositing the cheque we on that assurance gave you

> the post dated cheque, but we were surprised, so please in near future do a proper dealing with us and redeposit the cheque on 18/1/2000 but do give us a call before depositing."

7. Even thereafter, the cheque was dishonoured and at that time banker’s remark was "There is no account in the name of Motwani International with the said branch of Bank of Maharashtra".

8. Upon the employee being contacted and a notice being addressed to the accused No.3, a reply was addressed that the said accused has not signed or issued the cheque which was presented by petitioner complainant. On the other hand, the said cheque, according to them, was never issued by the firm from its bank account. The reply also states that the cheque is a forged one.

9. I am not concerned in this petition with the allegations in the complaint as far as accused No.1, employee of petitioner is concerned, because it is common ground that the process issued against him was not in issue either before the Magistrate or before sessions Judge in the relevant proceedings. The order issuing process as far as this accused is concerned, is, therefore, unchallenged. Case has proceeded as far as he is concerned.

10. However, as far as present petition is concerned, submission of Mr.Panicker is that in the light of a specific allegation in the complaint that accused No.3 and 1 colluded with each other and defrauded and cheated complainant, the learned Magistrate ought to have issued process against accused No.3 and set the criminal law in motion, more so, when learned Magistrate was not satisfied with the case set up in the

complaint and directed futher investigation. There is much substance in the contention of Mr.Panicker Police, thereafter, recorded statement of accused including accused No.3. In the statement made by accused No.3, it was very clearly stated that the accused No.3 had approached accused No.1 and pointed out that he had no funds to meet the liabilities of petitioner company. He requested employee of petitioner to bail him out. Initially, the accused No.3 was not ready to go ahead with the understanding arrived at with accused Nos. 1 and 2. Subsequently, it appears that all three viz., accused Nos. 1 to 3 decided that the accused No.2 who is wife of accused No.1 has a bank account with Bank of Maharashtra, Kandivali Branch. It was decided that accused No.1 would on the said cheque, after obtaining signature of the accused No.2 and the stamp of accused No.3's firm, forward the same to petitioner. That such was the understanding is clear from the statement

of accused No.3. He has very clearly stated that the cheque was handed over to the company but it was dishonoured on three occasions. Thereafter, on one occasion on his firm's letterhead a fax was addressed requesting that the cheque be represented. He, therefore, clearly admits that on the blank cheque forwarded by the accused No.1 to him, he put name of his company and inserted the figure of Rs.4 lakhs and thereafter, the said cheque was handed over to the petitioner.

11. Mr.Panicker states that upon this statement as also the statement of accused No.1, recorded during investigation, sufficient materials were there to prima facie show that the accused were guilty of the charges levelled against them in the complaint. Learned Magistrate does not take any cognisance of the same but states that offence is disclosed as far as accused No.1 and that too under section 408 and 477A of I.P.C. He refused to issue any

process as far as accused No.3. Mr.Panicker submits that even the learned Sessions Judge has committed the same mistake inasmuch as learned Sessions Judge terms police report as superficial and faults the investigating machinery for not investigating the matter further. According to learned Sessions Judge, a deeper probe was necessary and police ought to have collected materials which had evidentiary value. Material so collected, according to learned Sessions Judge, is not sufficient.

12. Mr.Jadhav, learned Counsel appearing for accused No.3, on the other hand submits that the sessions judge as well as Magistrate were right in their conclusion that prima facie no offence is disclosed as far as accused No.3. The entire issue is between the petitioner and its employee. It is the employee who is cheated and defrauded the company and the customer at a branch office had absolutely no role to play. Although, it may

be true that the money is due and payable but no criminal offence is committed. This being the position and when this Court is exercising powers under Article 227 of the Constitution of India, it cannot interfere with concurrent findings of fact. The revisional court has gone into the matter and merely because another view is possible, this Court should not exercise its jurisdiction and interfere with the orders passed by the courts below.

13. With the assistance of Mr.Panicker and Jadhav, I have perused the complaint, statements and the annexures. I have also perused orders passed by the courts below. As observed above, the contentions raised by Mr.Panicker are well founded.

14. It is well settled that the Magistrate exercises powers upon a complaint being forwarded to him under section 202. The Magistrate can

postpone the issue of process and either enquire into the case himself or direct investigation to be made by police officer or such other person as he may deem fit for the purpose of deciding "whether or not there is sufficient ground for proceeding". Section 203 contemplates that after considering the statement on oath of complainant and all the witnesses and the result of enquiry or investigation, if any, under section 202, the Magistrate is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint by recording brief reasons for so doing. However, what is material in this case is that the Magistrate has to find out, even after, he postponed issuance of process, as to whether there is sufficient ground for proceeding. He is not supposed to record conclusive finding as far as guilt or otherwise of the accused. That is a matter which has to be gone into at the stage of trial. When the Magistrate in the present case, despite materials

being produced to show that there is sufficient ground for proceeding, does not proceed against all accused and the complainant aggrieved by such action, invokes revisional jurisdiction, revisional court is also expected to find out as to whether there is sufficient ground for proceeding. That, revisional jurisdiction is meant for satisfying oneself as to the correctness, legality or propriety of finding, sentences or order recorded or passed and as to the regularity of the proceedings, is not disputed before me. In the present case, all that the revisional court was required to do was to scrutinise whether the Magistrate erred in only restricting issuance of process as far as employee - accused No.1. The complainant was also a revisional petitioner. It was alleging that there are sufficient grounds for proceeding also against accused No.3. In fact, it was the grievance of petitioner that there is material to proceed against wife of the employee. However,

that aspect need not be gone into as the wife of employee who was impleaded as respondent No.3 to this petition has been dropped.

15. Now what remains is whether sessions judge was in error as far as his observations with regard to the exercise undertaken by the Magistrate about proceeding against accused No.3. In para 9 of the order the learned Judge has gone into materials collected by the police, as if he is called upon to go into their evidantiary value. Further in paras 10 and 11, after setting out the stand of the accused No.3, learned Judge proceeds to hold in para 12 that even the fax on the letterhead cannot be taken assistance of, as the police have not taken steps to verify as to who had written this letter and whether the letterhead used for this purpose really belongs to respondent No.2.

16. In my view, the stage at which this has

to be gone into is not present one. For the purpose of finding out whether sufficient cause is made out to proceed in the matter today, there is a fax on the letter head. Whether it is signed by person authorised to sign it or whether it has been signed on a letterhead belonging to firm or not is something which the Court below will have to go at a later stage. Similarly, when there is statement of accused No.2 corroborating that a letter/ fax was addressed on the letterhead of company, it was not for the courts below to comment on its evidentiary value. That it has so commented is clear from para 13 of the Sessions Court’s order.

17. As the revisional court failed to exercise its jurisdiction vested in it by law the result is manifest injustice. In the instant case, learned Sessions Judge ought to have satisfied himself as to whether there was sufficient ground for proceeding further.

Instead of finding out this aspect he proceeded to go into the materials collected with an intention of holding whether accused No.2 could be convicted or whether the charge could be brought home against him. That was not the purpose of exercising revisional jurisdiction at this stage.

18. In my view, impugned order, therefore, suffer from apparent error on the face of record and could safely be termed as perverse. There was sufficient ground for proceeding against accused No.2. However, from reading of the complaint averments and the materials collected till date, a case is made out for proceeding further, insofar as section 420, 465, 467 of I.P.C. read with 34 thereof and not other sections invoked by the petitioner complainant. Magistrate, therefore, to issue process against accused No.2 calling upon him to answer as to why further steps in accordance with law should not

be taken in pursuance of the complaint.

19. Impugned orders are, therefore, quashed and set aside. The order issuing proceess would stand substituted and in addition to accused No.1 process should be issued now even against respondent No.2 in the said complaint. Further it is clarified that all observations in this order are prima facie and made for the purpose of finding out as to whether there is sufficient ground to proceed and shall not influence the court at the stage of trial. All contentions of accused No.2 on merits are expressly kept open.

(S.C.DHARMADHIKARI, J)